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Supreme Court of the United States

No. [redacted] 474

JOHNNY G. SPAHOS, EMORY C. BOBO, T. R. COLE, ALEXANDER P. SOLOMON, III, LABON F. HODGES, H. H. O'BRIEN, HENRY H. GLISSON, ROBERT T. BEELAND, B. TAYLOR SMITH, REGAL B. CONCEPCION, T. S. CHU, E. H. SMART, JOE HAWKINS, C. H. COBB, WILLIAM D. SMITH and MILLEDGE C. JONES,

Appellants,

versus

THE MAYOR AND COUNCILMEN OF THE TOWN OF SAVANNAH BEACH, TYBEE ISLAND, GEORGIA, a municipal corporation, HENRY M. BUCKLEY, Clerk of Council, J. A. BROWN, Mayor, WILLIAM S. LOVELL, ALEX MEDDIN, JOHN A. PETERS, BENNO P. HOSTI, JAMES H. POWERS and ROBERT L. WATERS, Councilmen, and WILLIAM C. FLEETWOOD, Councilman-Elect, and CHARLES M. DEBELE, E. A. LEONARD and DR. WILLIAM WEICHSELBAUM, JR., Board of Registrars of Chatham County, Georgia,

Appellees.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

AARON KRAVITCH,
PHYLISS KRAVITCH,
Attorneys for Appellants.

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IN THE SUPREME COURT OF THE UNITED STATES.

No.

JOHNNY G. SPAHOS, EMORY C. BOBO, T. R. COLE, ALEXANDER P. SOLOMON, III, LABON F. HODGES, H. H. O'BRIEN, HENRY H. GLISSON, ROBERT T. BEELAND, B. TAYLOR SMITH, REGAL B. CONCEPCION, T. S. CHU, E. H. SMART, JOE HAWKINS, C. H. COBB, WILLIAM D. SMITH and MILLEDGE C. JONES,

Appellants,

versus

THE MAYOR AND COUNCILMEN OF THE TOWN OF SAVANNAH BEACH, TYBEE ISLAND, GEORGIA, a municipal corporation, HENRY M. BUCKLEY, Clerk of Council, J. A. BROWN, Mayor, WILLIAM S. LOVELL, ALEX MEDDIN, JOHN A. PETERS, BENNO P. HOSTI, JAMES H. POWERS and ROBERT L. WATERS, Councilmen, and WILLIAM C. FLEETWOOD, Councilman-Elect, and CHARLES M. DEBELE, E. A. LEONARD and DR. WILLIAM WEICHSELBAUM, JR., Board of Registrars of Chatham County, Georgia,

Appellees.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

The complainants-appellants, having on August 10, 1962, filed their Notice of Appeal, now present this their statement of the basis upon which it is contended that The Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question, and should exercise such jurisdiction in this case.

1. (a) Opinion in the Lower Court.

This appeal is prosecuted from the final order, judgment or decree which dismissed the suit by complainants-appellants and denies the application for an interlocutory injunction therein to restrain the individuals composing the named defendants from permitting the registration and voting of non-resident property owners of said municipality and for other relief as set out in the complaint.

A copy of the opinion of the specially convened three-judge court of the United States District Court is attached hereto as *Appendix A*.

(b) Grounds on Which Jurisdiction of this Court is Invoked.

(i) Nature of Proceedings.

The proceedings concerned the constitutionality of certain statutes enacted by the Legislature of Georgia, in which statutes it was provided (1) for voting privileges to both residents of Savannah Beach and non-resident property owners of Savannah Beach, residing beyond the limits of said municipality but within the confines of

Chatham County, Georgia; (2) that three of the six Councilmen should be non-residents of Savannah Beach, but property owners at Savannah Beach and living within Chatham County, Georgia; and (3) the proceedings were brought to require that the registration laws be revised so as to strike the names of all persons other than domiciled citizens of Savannah Beach and to strike the provisions of the Acts with reference to the requirement for non-resident persons to hold elective office therein.

(ii) Date of Judgment and Notice of Appeal.

The proceedings were brought in the United States District Court for the Southern District of Georgia, Savannah Division, and referred to a three-judge court, which convened and subsequently decided the issues adversely to complainants.

The date of the final order, judgment or decree sought to be reviewed is July 24, 1962. Notice of Appeal was filed in the United States District Court for the Southern District of Georgia, Savannah Division, on August 10, 1962.

(iii) Statutory Provisions Believed to Confer Jurisdiction On This Court.

The statute provisions believed to confer on this Court jurisdiction of the appeal are as follows, to-wit:

Title 28, U.S.C.A. §1343;
Title 28, U.S.C.A. §§2201-2202;
Title 28, U.S.C.A. §2281;

Title 42, U.S.C.A. §1983 and
Title 28, U.S.C.A. §1253, which concludes as follows:

". . . Any party may appeal to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any civil action . . . to be heard and determined by a district court of three judges."

(iv) Cases Believed to Sustain the Jurisdiction.

Commonwealth of Kentucky vs. Powers, 139 F. 452;
Strauder vs. West Virginia, 100 U.S. 303, 25 L.Ed. 664;
Gomillion vs. Lightfoot, 364 U.S. 339, 81 S.Ct. 125;
South vs. Peters, 339 U.S. 276, 70 S.Ct. 641;
Barnard vs. Carey, 60 F.Supp. 539;
Alabama vs. Rogers, 187 F.Supp. 848;
United States vs. Alabama, 192 F.Supp. 677;
United States vs. Raines, 362 U.S. 25, 80 S.Ct. 519;
Baker vs. Carr, 82 S.Ct. 691;
Dyer vs. Kazuhisa Abe, 138 F.Supp. 220.

The tendency of the federal courts to extend their jurisdiction into voting matters to determine whether or not there has been invidious discrimination and denial of equal rights is pointed out in the case of *Alabama vs. Rogers, supra,* and in *Dinkens vs. Registrars of Montgomery County, Alabama,* 187 F.Supp. 848, affirmed without decision by the Fifth Circuit Court of Appeals, 285 F.2d 430, in which the Court held that the purpose of the Civil Rights Act of 1960 was *to secure a more effective protection of the right to vote.* They further

held that the right of the state to fix qualifications of the voters must be within Constitutional limitations and that the power to determine this is vested in the United States.

(v) Text of Statutes Involved.

The statutes of the State of Georgia involved in this complaint and appeal are as follows, to-wit: Acts of 1922, approved August 19, 1922, as amended by the Acts of 1937, page 61, Section 2; as amended by the Acts of March 24, 1939, Section 8, and by the Acts of 1947, page 597, and the Acts of 1949, page 271.

The full text of each of said statutes is attached hereto as *Appendix B*.

(c) Questions Presented by the Appeal.

Complainants-appellants contend that the said statutes of the State of Georgia are void and unconstitutional as applied to them on the following grounds:

(1) That non-resident and multiple voting is permitted under said Acts, and as a result the voice and right of the people of Savannah Beach to operate their own municipality has been seriously impaired and destroyed.

(2) That the rights of the residents of Savannah Beach under the Fourteenth Amendment of The Constitution of the United States are affected for the reason that said

laws are arbitrary and without just cause, because different standards are set up for different voters.

(3) That said laws violate the Fourteenth Amendment of The Constitution of the United States because they unjustly discriminate between residents of Savannah Beach and residents of Chatham County who own property at Savannah Beach.

(4) That the right to equal protection of the laws, as set out in the Fourteenth Amendment of The Constitution of the United States is not afforded to residents and taxpayers of Savannah Beach.

(5) That the right of the people of Savannah Beach to vote and elect all of the Councilmen has been illegally restricted by the Act which requires that they shall elect three non-resident Councilmen, and this provision in the Acts is illegal.

(6) That outside influences are permitted to dominate and control the affairs of said municipality.

(7) That elections held by virtue of said laws are illegal and unconstitutional, and that the registration books are illegal and void.

(8) That the votes of residents of Savannah Beach are diluted, and the inherent right of said residents to control the affairs of their place of domicile is affected.

(9) That no rational basis exists for the attempted differentiation by the Legislature of Georgia, and the

Acts, therefore, are in violation of the Fourteenth Amendment of The Constitution of The United States.

(10) That said statutes as applied to complainants make an arbitrary and unreasonable discrimination between residents and non-residents of said municipality, in violation of the Privileges and Immunities clause (Article IV, Section 2(1) of the Constitution, and the Due Process and Equal Protection clauses of the Fourteenth Amendment.

(11) That said statutes are not bona fide exercise of the police power by the Legislature of the State of Georgia with reference to the registration and voting laws of said municipality.

(d) Concise Statement of the Case.

The facts of the case are that several statutes have been passed by the Legislature of Georgia, as set out verbatim in *Appendix B* attached hereto, granting voting rights and the right to hold elective office to persons who are not domiciled residents of Sayannah Beach, thus establishing two classes of voters, and also permitting multiple voting. To remedy this situation, complainants sought legislative relief, which was unavailing, and carried the case to The Supreme Court of Georgia, where relief also was denied.

The present proceedings are brought in the United States District Court, alleging that these Acts and the acts of the officials entrusted with their enforcement

are contrary to the equal protection clause of the Fourteenth Amendment of The Constitution of the United States.

The facts were virtually all admitted, and were submitted to the court by stipulation and in affidavit form.

Final judgment and decree was predicated upon the issues raised by the complaint and the defendants' motion to dismiss and answers, and were in substance as follows:

(1) Whether a federal court of equity had jurisdiction to entertain the application for injunction;

(2) Whether the statutes attacked were unconstitutional; and

(3) Whether the complainants were entitled to the relief which they sought.

(e) This appeal is from a federal court decision.

(f) Importance of Issues.

The issues involved are of national importance in that they affect the rights of municipalities to invoke laws with reference to registration and voting without reference to the rights granted by the Fourteenth Amendment, without discrimination and in keeping with the equal protection clause, and a ruling herein would establish a standard and guidepost for the regulation of municipalities in many sections of the country and for the Legislatures of the various states. As a matter of

fact, there is at the present time a serious conflict among the states as to the legality of such statutes. The State of Florida, in the decision in *Hisgen vs. Rilleigh*, 115 So.2d 715, ruled that the Legislature of Florida had a right to pass an act setting up different classes of voters, while The Supreme Court of South Carolina has held that such an attempted act is illegal and unconstitutional. See *Thomas vs. Macklen*, 195 S.E. 539. The Supreme Court of Georgia has heretofore in several decisions held that such acts are within the power of the Legislature of the State of Georgia. See *Harris vs. McMillan*, 186 Ga. 529; *Sharpley vs. Fitzgerald*, 186 Ga. 536; and *Bobo vs. Savannah Beach*, 216 Ga. 12.

Substantial federal questions are raised on the right of the State to enact such a hybrid municipal election law, and there never has been any ruling by The Supreme Court of the United States on the merits of this proposition.

The amount involved is substantial, in that the loss to complainants will amount to more than $...,000.00.

(g) Matters In Which Court Abused Its Discretion.

The Court erred in the decision which it rendered for the reasons advanced in the authorities attached as *Appendix C* to this jurisdictional statement as a brief in support thereof, and because the judgment of the Court was in conflict with the recent decisions of The Supreme Court of the United States and other courts, as shown in the brief. The facts and the law sustain the proposition

that there was equity in the complaint and that the statutes attacked were unconstitutional and should have been set aside, and because the federal court has jurisdiction to entertain the application for injunction. The action of the Court in holding otherwise was contrary to law.

(h) There is appended to this jurisdictional statement as *Appendix A* a copy of the opinion rendered by the Court, which has not yet been reported in the official reports.

(i) Brief and argument in support of said jurisdictional statement are attached hereto as *Appendix C*.

Appellants submit in conclusion that This Honorable Court should grant the appeal and determine the issues on their merits.

Respectfully submitted,

AARON KRAVITCH,

PHYLISS KRAVITCH,
Attorneys for Appellants,

Postoffice Box 593,
Savannah, Georgia.

CERTIFICATE OF SERVICE.

I hereby certify that I am attorney of record for the ~~appellees~~ appellants in the within and foregoing matter; and

I further certify that I have this day served a copy of the foregoing Statement as to the Jurisdiction of The United States Supreme Court on Appeal to Review the Judgment or Decree in Question on the attorney's for the appellees, namely, The Honorable A. J. Solms, Jr., and A. A. Lawrence, Esq., by mailing a copy of the same, properly addressed and with adequate postage attached, to their respective offices in Savannah, Georgia.

This ..... day of SEP 28 1962 ....., 1962.

Attorney for Appellants

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION.

COMPLAINT No. 1331.

JOHNNY G. SPAHOS, EMORY C. BOBO, T. R. COLE, ALEXANDER P. SOLOMON, III, LABON F. HODGES, H. H. O'BRIEN, HENRY H. GLISSON, ROBERT T. BEELAND, B. TAYLOR SMITH, REGAL B. CONCEPCION, T. S. CHU, E. H. SMART, JOE HAWKINS, C. H. COBB, WILLIAM D. SMITH and MILLEDGE C. JONES,

v.

THE MAYOR AND COUNCILMEN OF THE TOWN OF SAVANNAH BEACH, TYBEE ISLAND, GEORGIA, a Municipal corporation, HENRY M. BUCKLEY, Clerk of Council, J. A. BROWN, Mayor, WILLIAM S. LOVELL, ALEX MEDDIN, JOHN A. PETERS, BENNO P. HOSTI, JAMES H. POWERS and ROBERT L. WATERS, Councilmen, and WILLIAM C. FLEETWOOD, Councilman-Elect, and CHARLES M. DEBELE, E. A. LEONARD and DR. WILLIAM WEICHSELBAUM, JR., Board of Registrars of Chatham County, Georgia.

Before BELL, Circuit Judge, SCARLETT and ELLIOTT, District Judges.

BELL, Circuit Judge:

Plaintiffs are residents of Chatham County, Georgia, and all save two are residents of Savannah Beach, Georgia,

a municipality therein. They claim violation of their civil rights as afforded them under the equal protection clause of the Fourteenth Amendment, and rely on *Baker v. Carr*, 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663, for jurisdiction, justiciability and standing to sue.

This is the last of four suits filed in Georgia shortly after the decision of the Supreme Court in *Baker v. Carr*.[1] The District Court for the Northern District of Georgia struck the statutory county unit system of primary elections in the form in which it then existed. *Sanders v. Gray*, N.D. Ga., 1962, 203 F.Supp. 158. Next, in *Toombs vs. Fortson*, N.D. Ga., 1962, 205 F.Supp. 248, the statutory basis for the election of state senators by rotation among the counties in the various senatorial districts was stricken, and it was held that at least one house of the General Assembly of Georgia must be apportioned to population to avoid that degree of discrimination prohibited by the equal protection clause of the Fourteenth Amendment. And in *Westberry v. Vandiver*, N.D. Ga., 1962, 206 F.Supp. 276, a complaint seeking relief from malapportioned congressional districts was dismissed for want of equity.

Here we are asked to lay our hand on the affairs of this municipality to the extent of striking certain state statutes permitting non-resident real property owners of the municipality who reside in Chatham County to vote in the elections of the municipality along with residents who may or may not own real property, and providing that three of the town councilmen shall be elected from

[1] Decision in each case by Three-Judge Statutory District Courts.

that class of voters who reside in Chatham County outside the corporate limits of the municipality.[2] Ga. Laws, 1922, p. 987; 1937, p. 2161; 1939, p. 1366; and 1949, p. 271.

The present mayor and councilmen were elected on the 2nd day of April, 1962, to take office on July 2, 1962 and we are asked to declare that election null and void, and to purge the list of voters to the end that the names of all persons not residents of and domiciled within the corporate limits of Savannah Beach be stricken therefrom. Temporary and permanent injunctive relief is sought against the defendants who are the mayor, councilmen, clerk of council, councilman-elect and members of the Board of Registrars of Chatham County in their official capacities.

Jurisdiction and three-judge court status is based on Title 28 USCA, §§ 1343, 2201-2202, 2281 and 42 USCA, § 1983. *Baker v. Carr, supra*, as we now understand it, resolved the issue of standing to sue, jurisdiction and justiciability where a question such that here is presented.

The case came on for trial after the pleadings were closed and on stipulated facts and affidavits.[3] The issues were narrowed to the alleged deprivation of rights under the equal protection clause of the Fourteenth Amendment, and the cause is not infected by questions based on race, creed or color.

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[2] The mayor and the other three councilmen must be residents of the municipality.

[3] The facts in this memorandum opinion are to be considered as findings of fact within the meaning of Rule 52(a), Fed R Civ. P., 28 USCA. Cf. *Myles v. Quinn Menhaden Fisheries, Inc.*, 5 Cir., 1962, 302 F.2d 146.

Savannah Beach is a resort town, situated on the Atlantic coast some eighteen miles from the City of Savannah, Georgia, and within Chatham County. According to the 1960 census it had a population of 1,385. It has a summer population of approximately 2,500 additional persons. The property in the town has a tax valuation of $4,414,298 and of this $2,852,040 is returned by non-resident property owners. As of December 26, 1961 there were 549 persons registered to vote as permanent residents, and 443 as non-residents by reason of owning property there. A substantial majority of these resided at Savannah Beach for a period of one to four months during the summer months.

It was chartered as Ocean City, Georgia, by the General Assembly of Georgia on October 15, 1887, Ga. Laws, 1887, p. 558. The charter restricted the franchise to citizens of Georgia owning any portion of land in the town, and who possessed other stated qualifications. The name was changed from Ocean City to "Town of Tybee" in 1888, Ga. Laws, 1888, p. 271, and in 1929 to the present name, Savannah Beach, Tybee Island, Georgia. Ga. Laws, 1929, p. 1366. The charter was revised in 1922 and the franchise was restricted to residents of Chatham County, rather than of the entire state, who owned a lot or parcel of land within the municipality. Any person was eligible to serve as mayor or councilmen if qualified to vote Ga. Laws, 1922, p. 987.

The charter was again revised in 1937 to provide that no person would be qualified for election as mayor or councilman unless he had been a bona fide resident of

the town for a period of at least one month during the year immediately preceding the election, and no person elected as mayor or alderman would be qualified to hold the office who was not, during his term of office, a bona fide resident of the municipality for a period of one month during the first nine months of each calendar year of service. Ga. Laws, 1937, p. 2161.

The Supreme Court of Georgia in *Harris v. McMillan*, 1938, 186 Ga. 529, 198 S.E. 250, and *Sharpley vs. Fitzgerald*, 1938, 186 Ga. 536, 198 S.E. 255, upheld the charter provision restricting the franchise to property owners and permitting non-resident property owners to vote, as being within the legislative power. One of the seven justices dissented on the ground that restricting the franchise to property owners violated the inherent right of Georgia citizens to vote.

The charter was amended in 1939, eliminating the property ownership prerequisite as to residents of the municipality but continuing it as to the class of voters who were residents of Chatham County but non-residents of Savannah Beach. Ga. Laws, 1939, p. 1366. This revision also provided that three of the six councilmen were to be residents and three non-residents. The mayor could be from either class.

The charter was amended in 1947 to provide that only residents of Savannah Beach would be entitled to vote and the mayor and councilmen were of course required to be qualified voters. Ga. Laws, 1947, p. 593. This Act was declared unconstitutional in the case of *Beraman v. Dutton*, 1948, 203 Ga. 672, 48 S.E.2d 101, because it was

not advertised as required under the Georgia laws, thus leaving the Act of 1939 in effect. The 1939 Act was amended in 1949 to provide that no person would be permitted to qualify as a candidate for mayor who had not been a bona fide resident and domiciliary of the town for a period of at least twelve months before qualifying, and who was not a registered and qualified voter of the town as provided by law. Ga. Laws, 1949, p. 271. The age requirement to vote was reduced from twenty-one to eighteen. This Act and even an era ended on the following note:

> "Section VII. Be it further enacted by authority of the same that it is the intention and the purpose of this Act that the various classes of voters and all persons concerned will view this Act with a spirit of tolerance and finally become convinced that, taking all factions, cliques and classes into utmost consideration, the results obtained herefrom shall be fair and equitable and that this Act will restore peace and harmony."

There were no further revisions of the charter in respect to the franchise or qualifications of city officials to hold office, nor was there any further litigation until *Bobo v. Mayor and Councilmen of the Town of Savannah Beach*, 1960, 216 Ga. 12, 114 S.E.2d 374, where The Supreme Court of Georgia in affirming dismissal by the lower court in an unanimous opinion reiterated the following part of *Harris v. McMillan:*

> "There is no requirement in our Constitution that there be uniformity in the charters of our municipalities . . . In so far as the powers and restrictions

> contained therein run counter to no constitutional provision, and no general law, they are valid. The legislature had the power, in granting this charter, to permit persons residing without the municipality but owning real estate therein but residing in the County of Chatham, to vote and hold office in such municipality, if otherwise qualified under the Constitution."

and went on to hold:

> "There is also no merit in the contention that the provision in Tybee's charter which permits such non-resident persons to thus participate in the management of its municipal affairs offends the equal-protection clauses of the Federal Constitution (Code § 1-815) and the Constitution of this State (Code § 2-103), on the ground that it dilutes the voting power of those who actually reside within the municipality and is therefore discriminatory class legislation. 'It is only in cases where laws are applied differently to different persons under the same or similar circumstances that the equal protection of the law is denied.' *Baugh vs. City of LaGrange*, 161 Ga. 80 (2a) (130 S.E. 69); *City of Valdosta v. Harris*, 156 Ga. 490 (4) (119 S.E. 625)."

The Supreme Court of the United States dismissed the appeal of the plaintiff there, who is one of the plaintiffs here, from the decision of the Georgia court for want of a substantial federal question. 364 U.S. 339, 81 S.Ct. 181, 5 L.Ed.2d 185 (1960).

We need not concern ourselves with the question of this decision being *res judicata* on the present question nor with the doctrine of *stare decisis*. Cf. *Baker v. Carr*, *supra*, the rationale of which indicates that the previous

dismissal for want of a substantial federal question could have been based on lack of justiciability, a doctrine we take now to have been dissipated, if not disavowed, by the court as it regards political questions of the type under consideration:

This is for the reason that the case of plaintiffs is fatally deficient in two other respects. First, the "strangle hold" situation present in *Baker v. Carr*, which we view as the *sine qua non* of that decision is not present here. The plaintiffs there had been unable through the course of many years to obtain what the Tennessee Constitution guaranteed them. No state constitutional guaranty against such non-resident voters is present here.

Plaintiffs assert rights under, and discrimination proscribed by, the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Political rights, such as the right to vote, are protected by the equal protection clause. *Baker v. Carr, supra; Sanders v. Gray, supra.* But discrimination must reach the point of invidiousness to become actionable, and here the discrimination, if there is discrimination on the theory of allowing non-residents to vote in the municipality along with residents, when such is not done in other municipalities within Chatham County or within Georgia, is not invidious if there is a reasonable chance that political relief can be obtained.[4] The legislative history heretofore set out amply demonstrates that there is. In fact, complete relief was obtained under the 1947 Act. Furthermore, there is no proof that the assistance of the mayor

[4] No plaintiff is a property owner residing outside Chatham County and no questions of denial of equal protection to such persons is before the court.

and council who could intercede with the Chatham County legislative delegation, has been sought. There is no "strangle hold" here within the meaning of *Baker v. Carr.*

Furthermore, we find a lack of arbitrariness in the charter provisions as they relate to the franchise, and to eligibility to hold office, and there is no contention of irrationality. Cf. *Sanders v. Gray, supra,* and *Toombs v. Fortson, supra.*

Admittedly the desired end may be obtained in less time through the judicial process but the courts are not empowered to grant dispensations normally forthcoming through the legislative process. Courts can only do the minimal necessary to accord constitutional rights where they are being withheld, and then only on clear proof that they may not be otherwise obtained.

The other controlling deficiency is the right of the State to make the classification here, residents on the one hand and non-resident property owners on the other. The rules by which this state action must be tested are settled. *Lindsley v. Natural Carbonic Gas Company,* 1911, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369. The classification must have some reasonable basis and does not fail because it in practice results in some inequality. If any state of facts reasonably can be conceived that will sustain it, the existence of that state of facts must be assumed. And those who assail the classification must carry the burden that it does not rest upon any reasonable basis, but it is essentially arbitrary. In *McGowan v. State of Maryland,* 1960, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 the Supreme Court stated the rule as follows:

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The objective of the legislature here was undoubtedly to permit those persons owning property within the municipality, many of whom were summer residents therein, to have a voice in the management of its affairs. This appears to be a rational objective and the plaintiffs have failed to show that the classification thereunder is arbitrary or unreasonable.

The cause of plaintiffs is wanting in equity. It should be and is hereby DISMISSED.

This 23rd day of July, 1962.

GRIFFIN B. BELL,
United States Circuit Judge.

FRANK M. SCARLETT,
United States District Judge.

J. ROBERT ELLIOTT,
United States District Judge.

APPENDIX B.

Act No. 393
Approved by the Governor
August 19, 1922

An Act to amend, revise and consolidate the several Acts granting corporate authority to the Town of Tybee, and for other purposes.

Section 8:

Be it further enacted, that the qualifications necessary to entitle a person to vote for Mayor or Councilman of the Town of Tybee at elections held for that purpose, shall be as follows: Such persons shall be of at least twenty-one years of age; shall own in his or her own name and right a lot or parcel of land in said town, the deed to which has been recorded in the office of the Clerk of the Superior Court in Chatham County, Georgia, at least sixty days prior to said election; shall be a citizen of the United States and shall have been a resident of the State of Georgia and of the County of Chatham continuously during the twelve months immediately preceding said election; shall have paid all taxes due to the State, County and Town of Tybee, and shall have registered in conformity to such regulations as are herein prescribed.

Section 15:

Be it further enacted, that no person shall be eligible to the office of Mayor and Councilmen unless at the time of such election he is entitled to vote at such election.

Section 16:

Be it further enacted, that the Mayor shall be Chief Executive of the Town of Tybee; he shall see that all laws, ordinances, resolutions and rules of the town are faithfully executed and enforced; that all officers of the town faithfully discharge the duties required of them pertaining to their office. The Mayor shall have the general supervision of all the officers of the town; he shall preside at all meetings of the Mayor and Councilmen of the Town of Tybee; he shall have the right to vote in elections for officers and upon all other questions before said body where there is a tie vote, except where he is disqualified by reason of interest, relationship or otherwise. The Council snall elect one of their number as Chairman of Council who shall act as Mayor pro tem in the absence or disqualification of the Mayor.

Section 19:

Be it further enacted, that the Mayor and Councilmen of the Town of Tybee, shall elect a Clerk of Council and a Treasurer of said Town, which said offices may be held by one and the same person, to hold office until their successors are duly elected and qualified; and that said Clerk of Council and Treasurer shall be elected at such time and for such term, and receive such compensation, and discharge such duties as may be prescribed by the ordinances of said town. The said Clerk and Treasurer shall give such bond as may be required. The Treasurer shall be the custodian of the funds of the town and the Clerk shall be the keeper of the records of said town and shall be Clerk of the Mayor's Court. For the willful neglect of duty or abuse of any of the powers

conferred upon either the Clerk of Council or the Treasurer he may, after the hearing, be removed by a majority vote of the Mayor and Councilmen. Should any criminal charge be brought against him, he may, at the discretion of the Mayor and Councilmen, be suspended from office, and upon conviction shall be removed from office pending such suspension, and upon removal the Mayor and Councilmen shall have the power to appoint some person to discharge the duties of his office.

Section 21:

Be it further enacted, that said Mayor and Councilmen shall have power to levy, impose and collect an ad valorem tax upon all real and personal property within the corporate limits of said town, that may be deemed advisable and not in conflict with the laws of this State; provided that such taxes do not exceed one and one-half percent of the value of said property. Said Mayor and Councilmen shall provide by ordinance for the annual assessment of the taxable property in said town, and the mode and manner of valuing such property for taxation; but they shall not collect a tax of more than one dollar and fifty cents ($1.50) on each one hundred dollars ($100.00) valuation of property.

Section 37:

Be it further enacted, that the Mayor and Councilmen of the Town of Tybee shall have full power and authority to establish and adopt all ordinances, rules, regulations and resolutions passed, not in conflict with the Constitution and Laws of the State of Georgia, which tend to

promote the safety, health, good order and general welfare of the inhabitants of said town.

Act No. 461
Approved by the Governor
March 30, 1937

An Act to alter, revise and amend the several Acts incorporating the Mayor and Councilmen of the Town of Tybee now known as Savannah Beach, and for other purposes.

Section 2:

Be it further enacted that no person shall be qualified for election as mayor or alderman of the said Town of Savannah Beach unless he has been a bona fide resident of said town for a period of at least one month during the year immediately preceding the election, nor after the present term shall any person elected to such office be qualified to hold such office who does not during his term of office bona fide reside within the corporate limits of said town for a period of one month during the first nine months of each calendar year of his service.

Act No. 322
Approved by the Governor
March 24, 1939

An Act to revise, alter and amend Several Acts incorporating the Town of Tybee, now known as Savannah Beach, Tybee Island, Georgia, and for other purposes.

Section 1:

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority

of the same, that the Act of the General Assembly of the State of Georgia, approved August 19, 1922, entitled "An Act to amend, revise, and consolidate the several Acts granting corporate authority to the Town of Tybee; to confer additional powers on the Mayor and Councilmen of the Town of Tybee; to define the corporate limits of said Town, and for other purposes," be and the same is hereby amended by striking from said Act Section 8 thereof and enacting in lieu thereof the following to be known as Section 8 of said Act:

"Section 8. Be it further enacted that the following persons shall be qualified and entitled to vote for Mayor and Councilmen of the Town of Tybee at elections held for that purpose: persons who shall be 21 years old, or upwards, shall own in his own name and right a lot or parcel of land in said Town, the deed to which has been recorded in the Office of the Clerk of the Superior Court of Chatham County, Georgia, at least sixty days prior to said election, shall be a citizen of the United States, and shall have been a resident of the State of Georgia one year next preceding said election, and shall have been a bona fide resident and domiciled in the County of Chatham six months next preceding said election, and shall have paid all poll taxes that he or she may have had an opportunity of paying agreeably to law; and in addition thereto, persons who shall be 21 years old, or upwards, who shall be a citizen of the United States and shall have resided in this State one year next preceding the election and shall have been a bona fide resident and domiciled within the corporate limits of the Town of Savannah Beach, Tybee Island

six months next preceding the election, and shall have paid all poll taxes that he or she may have had an opportunity of paying agreeably to law."

Section 2:

Be it further enacted that, hereafter in all elections for Mayor and Councilmen of said Town of Savannah Beach, Tybee Island, three of said Councilmen elected shall be bona fide residents and domiciled within the corporate limits of the Town of Savannah Beach, Tybee Island, and qualified as voters thereof; and that three of the Councilmen elected shall be bona fide residents and domiciled in Chatham County, outside the corporate limits of the Town of Savannah Beach, Tybee Island, and shall own property at Savannah Beach, Tybee Island, and shall be qualified voters thereof. All of the Councilmen elected shall also have the qualifications prescribed by Section 2 of the Act of March 30, 1937, amending the Charter of said Town. Anyone who is a qualified voter of Savannah Beach, Tybee Island, may be elected Mayor thereof, provided that he is qualified as prescribed by Section 2 of the said Act of March 30, 1937. Should a vacancy occur in the office of Mayor by death, resignation or any other cause, such vacancy shall be filled by a majority vote of said Councilmen. Should a vacancy or vacancies occur in the office of Councilmen by death, resignation or any other cause, such vacancy or vacancies shall be filled by a majority vote of said Council, provided that the Councilman elected shall be registered in the same class of electors as that of his predecessor.

Section 6:

Be it further enacted that the consolidated list of voters as above prescribed shall be and become a permanent registration of the voters for Mayor and Councilmen of the Town of Savannah Beach, Tybee Island, and that persons who are qualified as voters of said Town who are not included on said permanent list may hereafter register and have their names added to said list during the time which the Clerk of Council shall open the registration list of voters at the Town Hall in Savannah Beach, Tybee Island, ninety days prior to the first Monday in March of each year in which an election is held; which list shall be kept open from ten o'clock, a.m., until five o'clock, p.m., each and every day, Sundays and legal holidays excepted, until forty-five days prior to the first Monday in March in the year in which an election is held when said list will be finally closed. Provided, however, that during the last fifteen days, Sundays and legal holidays excepted of the above period, the Clerk of Council shall keep said list open in a place designated by the Mayor and Councilmen of the Town of Savannah Beach, Tybee Island, in the City of Savannah, Georgia, from ten o'clock, a.m. until five o'clock, p.m. on each day in order that the duly qualified electors residing in Chatham County will have an opportunity to register in the City of Savannah instead of at Savannah Beach, Tybee Island. It shall be the duty of the Clerk of Council of said Town of Savannah Beach, Tybee Island, to submit the permanent registration list of voters and or electors of said Town to the Board of Registrars of Chatham County thirty days prior to the first Monday

in March of each year in which an election is held for the purpose of having said registration list purged by the said Board of Registrars of Chatham County, and for the purpose of having removed from such registration list the names of all persons who may have become disqualified to vote. It shall be the duty of said Board of Registrars of Chatham County to purge said list when so submitted to them by the Clerk of Council and to remove therefrom the names of all voters and or electors who are not qualified to vote in the election for Mayor and Councilmen of the Town of Savannah Beach, Tybee Island, and to return such list of voters duly approved by the said Board to the Clerk of Council at least ten days prior to the holding of any election provided for under the terms of this Act. Such approved list of the registered and qualified electors and or voters of the Town of Savannah Beach shall be the list of electors and or voters eligible to vote in the next succeeding election to be held for Mayor and Councilmen of Savannah Beach. For such service the Board of Registrars of Chatham County shall receive the sum of Fifteen Dollars ($15.00), to be paid out of the Treasury of the Town of Savannah Beach, Tybee Island.

Act No. 64
Approved by the Governor
February 8, 1949

An Act to revise, alter and amend the several Acts incorporating the Mayor and Councilmen of the Town of Tybee, now known, under the Acts of the General Assembly approved August 1, 1929, as Savannah Beach, Tybee Island; and for other purposes.

Section 4:

Be it further enacted by authority of the same that after said election called for the second Tuesday in June, 1949, that in all future general elections for Mayor and Councilmen of Savannah Beach, Tybee Island, and in all special elections which may be called for the election of Mayor and Councilmen aforesaid, that no person shall be permitted to qualify as a candidate for Mayor who shall not have been a bona fide resident within the corporate limits of Savannah Beach, Tybee Island, for a period of at least twelve (12) month before qualifying as a candidate for Mayor and shall have maintained his or her domicile within the corporate limits of the Town of Savannah Beach, Tybee Island, for said period of twelve (12) months. Any such candidate for Mayor shall also have been a registered and qualified voter of the Town of Savannah Beach, Tybee Island, as provided by law.

Section 5:

Be it further enacted by authority of the same that, in addition to the other qualifications for voters now existing, persons entitled to vote shall also include all persons who are otherwise qualified to vote and who have attained the age of eighteen (18) years.

APPENDIX C.

BRIEF AND ARGUMENT.

Complaint sets out a substantial legal question.

The argument that the complaint fails to state a claim on which relief can be granted, and also that it fails to set out a substantial federal question, can be answered as one joint objection. As will be hereinafter pointed out, the federal courts have never deviated from their view that the right to vote is an inherent and constitutional right (see *Howard vs. Ladner*, 116 F.Supp. 783-787 (5CCA)), but had held that the states had a broad discretion in determining the qualifications of voters and also the powers of municipalities, and even when this discretion was abused, up to recent years, they had held that these questions were non-justiciable and of a political nature and refused to take jurisdiction on this ground, and on this ground alone.

> "Although the particular qualifications one must possess to exercise this right to vote are left to the states—as long as that exercise is within the constitutional framework—the power to protect voters who are qualified is confided to the Congress of the United States."
>
> *Alabama vs. Rogers, 187 F.Supp. 848, 854.*

For many years federal courts refused to take jurisdiction in school matters and in matters of apportionment and in the county unit system. They never upheld these procedures as being inherently right, but hereto-

fore refrained from taking action on purely technical grounds. Then came the first breakthrough in the segregation cases, then in reapportionment matters and in the county unit system, each decision being more far-reaching. See *Brown vs. Board of Education of Topeka, Kansas*, 349 U.S. 294; *Baker vs. Carr*, 30 L.W. 4203, 82 S.Ct. 691; and *Sanders vs. Gray*, 203 F.Supp. 158.

As an illustration of this changed point of view, we refer the Court's attention to the recent case of *Mapp vs. Ohio*, decided June 19, 1961, reported in 367 U.S. 643, dealing with unreasonable search and seizure where the federal courts for years have tried to distinguish between the unlawful acts of state officers and acts of federal officers, wherein the Court made this statement:

> "Nothing can destroy a government more quickly than its failure to observe its own laws . . ."

In view of the advanced reasoning of the Supreme Court, starting with *Gomillion vs. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, and running through the various Supreme Court and three-judge decisions thereafter, and the philosophies expressed therein, it furnishes no reasonable logic that, because the Supreme Court of the United States on appeal heretofore refused to review the *Bobo* case because no substantial federal question was involved, would answer the argument that the same ruling would be made at the present time. There are many decisions in which, within a relatively short period of time, the Supreme Court has altered its views, principally in cases dealing with educational matters and voting rights. For a long

number of years the Court had consistently held that the matter of education was not covered by the Fourteenth Amendment. The first break came in the famous "separate but equal" facilities rule, and then the final breakthrough that where facilities are separate they are not equal. Since the *Bobo* decision was rendered on November 14, 1960, 216 Ga. 12, which was a memo decision, refusing to allow the appeal from the decision of The Supreme Court of Georgia, there have been four distinct decisions, to-wit: *Gomillion vs. Lightfoot, supra; Sanders vs. Gray, supra; Baker vs. Carr, supra;* and the latest decision in *Toombs vs. Fortson*, C.A. 7883, decided May 25, 1962, all of which have asserted the philosophy that the right to cast a ballot undiluted and undiscriminated against is an inherent and constitutional right. That being true, it must follow that these issues arise under the Constitution and laws of the United States, both as to equal protection and as to a republican form of government, and that this Court has jurisdiction in the premises and that there is a substantial federal question involved.

The courts have shown a determination to give our written Constitution, by interpretations, such flexibility as will bring them into accord with what the courts believe to be in the public interest. Their terms and provisions are being constantly expanded and enlarged by construction to meet the advancing and improving affairs of men. It has been authoritatively stated that as changes come in social and political life the Federal Constitution embraces in its grasp

all new conditions which are within the scope of the powers and terms conferred. *11 American Jurisprudence*, §51, p. 660.

Finally, the present case is a *direct* appeal to the federal courts, by new parties, on enlarged facts, and on an additional ground, viz., "republican form of government," which doctrine, heretofore dormant, has been revitalized.

Historical Background.

Although the federal courts did not recognize that either education or elective franchise were matters subject to federal review until recent years, the philosophy underlying the Fourteenth Amendment was recognized within a comparatively few years after its adoption, and the same fundamental principles which governed then govern now, as is shown by the decision in *Barbier vs. Connolly*, 113 U.S. 27, 28 L.Ed. 923 wherein the Court said:

> "All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.
>
> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of pro-

> erty, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the redress of wrongs . . . that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling . . . ."

In the case of *Brown vs. Board of Education of Topeka, Kansas*, 347 U.S. 483, The Supreme Court of the United States gives the historical background and evolution of the Fourteenth Amendment, in which it makes this observation:

> "In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of 'separate but equal' did not make its appearance in this Court until 1896 in the case of *Plessy vs. Ferguson*, 163 U.S. 537."

The decision in *Plessy vs. Ferguson, supra*, considered that equality of treatment was accorded when the races were provided with 'substantially equal facilities.

The Court continued its historical recital as follows:

> "American courts have since labored with the doctrine for over half a century . . . In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy vs. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life and throughout the Nation . . . Today, education is perhaps the most important function of state and local governments . . . It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

The analogy with this is to be found in the fact that today all over the world the right of self-determination is stirring in the hearts of all men, even those who in recent years were regarded as savages. Surely that right, given to the Congo, in the Sahara, in the swamplands of Thailand, and other remote places of the world, should not be denied to American citizens residing within the limits of the United States.

In the companion case of *Brown vs. Board of Education of Topeka, Kansas*, found at 349 U.S. 753, the contentions that the courts are more or less bound by strait-jacket rules of procedure, as distinguished

counsel seek to invoke in this case, were answered by the Court on page 756 of that decision, wherein it is stated:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

Complainants Have a Right of Action.

See *United States vs. Alabama*, 1961, 192 F.Supp. 677(4) with reference to protection of the right to vote free from discrimination under the Civil Rights Act of 1957.

The answer to the issues raised in the instant case and in these other cases is crystal clear when examined in the light of the liberal attitude now taken by the federal courts.

A great number of decisions now have been passed by the courts with reference to these issues. The leading decision was handed down recently in *Baker vs. Carr, supra.* Although this case dealt with reapportionment, much of the legal philosophy expressed by the Court is applicable to the present case. In that decision the Court said:

> "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution . . ."

To seek to justify the perpetuation of this inherently illegal and vicious law simply because it has existed for a number of years, or to seek to evade rectifying this wrong on some technicality, would do violence to the expressions in *Mapp vs. Ohio, supra*, that:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

Jurisdiction.

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States . . ."
>
> *28 U.S.C.A., §1343(3).*

As to justiciability, the Court ruled in the *Baker* case:

> "The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is 'little more than a play upon words.' *Nixon vs. Herndon*, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759."

Even a casual reading of the Supreme Court's decision in the *Baker* case, both in the majority opinion and the concurring opinions, makes it clear that this

Court has jurisdiction of the subject matter, that the issues here drawn are justiciable issues, and that these complainants have standing to sue. As was said in the *Baker* case, and it is equally true in the instant case, these complainants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their claim is, in substance, that the present statutes constitute arbitrary and capricious state action, offensive to the Fourteenth Amendment, and effecting a gross disproportion of representation to residents of Savannah Beach.

With reference to the claim that the control of municipalities is vested solely in the Legislature, as enunciated by the Georgia Supreme Court in *Bobo vs. Savannah Beach, supra,* the Court differs with this specious view in its decision in the *Baker* case, in which it said:

> "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution . . . The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political sub-divisions. 'It is inconceivable that guaranties embedded in The Constitution of the United States may thus be manipulated out of existence.' (*Gomillion vs. Lightfoot*, 364 U.S. at 344-345, 81 S.Ct. at 129.)".

In the *Gomillion* case the Legislature of Alabama sought to redraft the boundaries of the Town of

Tuskegee so as to move out of the city a large segment of the negro voters. The plaintiff in that case claimed deprivation of the right to vote in municipal elections. The District Court, in 167 F.Supp. 405, dismissed the case for want of jurisdiction and failure to state a claim upon which relief can be granted, and this was affirmed by the Fifth Circuit Court of Appeals, 270 F.2d 594. Both decisions were reversed by The Supreme Court of the United States, 364 U.S. 339, 81 S.Ct. 125, in which the Court said:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

This doctrine enunciated by the Courts that while states have a right to regulate the affairs of municipalities, the same must be done within the bounds of the Federal Constitution is not a new concept. In *South Carolina vs. United States*, 199 U.S. 261, on page 264 the Court said:

> "We have in this republic a dual system of government,—national and state,—each operating within the same territory and upon the same persons, and yet working without collision, because their functions are different. There are certain matters over which the national government has absolute control, and no action of the state can interfere therewith

* * *

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable."

In *Home Building and Loan vs. Blaisdell*, 290 U.S. 398, on page 442, the Court said:

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant, to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is *a constitution* we are expounding' (*M'Culloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579, 601)—'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.' Id. p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U.S.

416, 433, 64 L.Ed. 641, 647, 40 S.Ct. 382 . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'"

"Legislative bodies, under the guise of police regulations protecting the public welfare, cannot arbitrarily pass laws which have no relation to that object; and if the principal purpose of a statute is to give an advantage to one class of citizens to the disadvantage of others, the courts will look behind even the declared intent of the legislature and relieve citizens against the oppressive act."

11 American Jurisprudence, §305, p. 1086.

"Municipal bylaws and ordinances, undertaking to regulate are . . . subject to investigation by the courts . . . Where the legislative enactment is manifestly unreasonable and arbitrary and offends against prohibitions within the Federal or state Constitution, it becomes the duty of the judiciary to declare the ordinance invalid."

11 American Jurisprudence, §307, p. 1092.

"It is a fundamental guaranty of American constitutional government that no person shall be deprived of his liberty without due process of law. The liberty thus guaranteed by the Federal and state Constitutions is a very broad and extensive concept. Judicial interpretation has given to this

word as so used its most comprehensive signification; it has been said to embrace every form and phase of individual right that is not necessarily taken away by some valid law for the common good . . . . The term 'liberty' as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of man to be free in the enjoyment of those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

11 American Jurisprudence, §329, pp. 1134-1136.

See *Pierce vs. Society of Sisters*, 268 U.S. 510; *Meyer vs. Nebraska*, 262 U.S. 390; and *Adams vs. Tanner*, 244 U.S. 590.

"'Liberty' as the term is used in the Constitution is deemed to embrace the right of every man to be free in the use of his powers, faculties and property, and to adopt and pursue and employ those things in such lawful way as he may choose, subject only to such restraints as are necessary to secure the common welfare."

Mt. Vernon vs. Julian, 17 N.E.2d 52.

In the decision in *Sanders vs. Gray, supra*, and in the case of *Henry J. Toombs et al. vs. Ben W. Fortson, Jr., et al.*, C.A. 7883, rendered Friday, May 25, 1962, on the question of the reapportionment of the Legislature of Georgia, both courts quoted liberally from *Baker vs. Carr, supra*. Referring to the right to vote

being a constitutional right, the Court used this expression:

> "The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality, vis-a-vis voters in irrationally favored counties. A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . ."

Further in that decision the Court said:

> "They are asserting a 'plain, direct and adequate interest in maintaining the effectiveness of their votes.' *Coleman vs. Miller*, 307 U.S. at 438."
>
> "This is not merely a claim of the right possessed by every citizen 'to require that the government be administered according to law.'"
>
> *Fairchild vs. Hughes*, 258 U.S. 126, 129, 42 S.Ct. 274, 275, 6 L.Ed. 499.
>
> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."
>
> *Marbury vs. Madison*, 5 U.S. 137, 163, 1 Cranch 137, 163, 2 L.Ed. 60.

Discrimination.

In the *Baker* decision the Court went on to say that the question under review was whether disparities

between voting strengths in the state legislature constitute "invidious discrimination." Although the case at bar does not deal with the state legislature, there is no question about the fact that the disparities between the votes after dilution by the action of the Legislature does constitute "invidious discrimination" in favor of the residents of Chatham County who own property at Savannah Beach.

As the Court said in *Sanders vs. Gray, supra:*

> "A test for invidiousness must be formulated. Unlike per se invidiousness, springing from discrimination based on race, creed or color, we must here deal with discrimination not so infected, but arising out of a state legislative classification diffusing . . . political strength . . . We make the test on a consideration of all relevant factors, and these include rationality of state policy . . . Another test is whether or not the system is arbitrary . . . Having concluded that the gross disparities here imbedded . . . cannot be related to a rational policy, we also conclude that the system is arbitrary in any sense of the term."

We call attention of the Court to the fact that in no other municipality of Georgia, resort town or otherwise, does the right of multiple or non-resident voting prevail, which certainly should show that such acts are arbitrary and irrational. The record discloses that not only non-resident voting but multiple voting likewise has been indulged at Savannah Beach. That

under the present statutes, it not only is possible but the condition actually exists where joint owners of the same piece of property, who are non-residents of Savannah Beach, each can vote, and in some cases a piece of property has been split into smaller portions so that each owner of the smaller segment is permitted to vote. Thus, in one case, a total of six persons are permitted to vote because of their joint ownership of a single piece of property. Such advantages do not accrue to Savannah Beach residents because their right to vote is not based on property ownership but on domicile.

Further answering the argument that from an historical standpoint the condition which has been created at Savannah Beach should be permitted to continue to exist, the Court said in *Sanders vs. Gray, supra:*

> "We are unable to discern any justification for continuing this system merely because it has an historical basis."

The learned Court could have, without doing violence to its decision, incorporated therein an expression by Mr. Justice Frankfurter, in *Griffin vs. Illinois*, 351 U.S. 12, 76 S.Ct. 585, on page 594, in which the learned Judge gave vent to this expression of candor and clarity:

> "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more con-

ducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law."

Adequate Relief Unavailable.

On the issue as to whether or not the complainants could obtain adequate relief at the hands of the Legislature or at the hands of the State Supreme Court, evidence shows that for a long number of years complainants have been seeking to remedy this situation without aid from the Legislature which has turned a deaf ear to their entreaties, due to the desire not to offend the great bulk of voters of Chatham County and in the City of Savannah, and the Georgia Supreme Court has three times refused to interfere on the ground that the State has the right to regulate the affairs of municipalities, even to the extent of trampling constitutional rights. This same issue was raised in the recent case of *Toombs vs. Fortson, supra*, decided May 25, 1962, in which the Court said:

> "To argue as do the defendants here that the plaintiffs should be remitted to the State Legislature to seek the redress which they claim is their constitutional right, would be to expect them to succeed in having those in a dominating position . . . voluntarily surrender their position. The record is barren as to the likelihood of this occurring."

Suffice it to say, there have been numerous appeals to the Legislature and three appeals to the courts

of Georgia to afford complainants some relief, and both the Legislature and The Supreme Court of Georgia have failed to act.

Constitutional and Inherent Right of Franchise.

In *United States vs. Saylor*, 322 U.S. 385, dealing with the right to vote being a recognized right, the federal court acted where a United States official was being elected, namely a Senator, and held that:

> "In the free exercise and enjoyment of the rights and privileges guaranteed to the citizens by the Constitution and laws of the United States, namely, the right and privilege to express by their votes their choice of a candidate for Senator and their right to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed."

It will be noted that in the minority opinion in this case the Court also said that Congress has the power to legislate and to protect the election of its members from fraud and corruption. This expression has been broadened, and in the case of *South vs. Peters, supra*, dealing with the county unit system of Georgia, relief was denied because the Court held that this was a political issue, which rule subsequently was reversed by the courts in *Baker vs. Carr, supra*, and *Sanders vs. Gray, supra*. In the decision in *South vs. Peters, supra*, the Court used this pertinent language:

"Where, as in Georgia, a party primary election is an integral part of the state election machinery, the right to vote in it is protected by the Fifteenth Amendment . . .

• • •

"There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted . . . That federally protected right suffers substantial dilution in this case. The favored group has full voting strength. The groups not in favor have their votes discounted."

Then, after speaking about negroes and how they are discriminated against, the Court went on to say:

"The racial angle of the case only emphasizes the bite of the decision which sustains the County Unit System of voting. The discrimination against citizens in the more populous counties of Georgia is plain . . . . The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government."

See *United States vs. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, and *Ex parte Yarborough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274.

On page 277 of the opinion in *South vs. Peters, supra*, the Court said:

> "I suppose that if a State reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote, we would strike the law down."

Although this statement is in the dissenting opinion, the dissenting opinion subsequently has become the majority view of the Court and it would *a fortiori* follow that if diluting the vote of a person because of race or creed would be unconstitutional, the diluting the vote of a person because so-called "foreigners" were permitted to invade his home and take away from him the right to control the destinies of the community in which he lived would be equally abhorrent to the law.

> "While it is generally thought that the civil rights apply only to protecting negroes, this is far from being true because 'this section, so far as it confers rights, is not limited to negroes and colored persons; it confers rights on white persons, and puts in the form of a statute what has been substantially ordained by the Constitution."
>
> *Kentucky vs. Powers, 139 F. 452.*

Legislative Right Over Municipalities Subject to United States Constitution.

The Supreme Court of Georgia held in the *Harris, Sharpley* and *Bobo* cases, as was held in the Florida case, *Hisgen vs. Rileigh,* 115 So.2d 715, that states have

power to do as they will with municipal corporations. This line of authority runs head-on into the decision of The Supreme Court of the United States in *Gomillion vs. Lightfoot, supra,* in which the Court said:

> "This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of the consequences. Legislative control of municipalities, no less than other state power, lies within the scope of the relevant limitations imposed by the United States Constitution."

A state case in line with the federal decisions, and contrary to the Georgia and Florida decisions, is the interesting case of *Thomas vs. Macklen,* 195 S.E. 539, where the Legislature of South Carolina attempted to create the same sort of multiple and dual voting at Myrtle Beach as the Georgia Legislature has done at Savannah Beach. In a well considered opinion, The Supreme Court of South Carolina held:

> "Provisions . . . governing incorporation of 'resort communities' which give nonresident freeholders of the . . . town the right to vote and hold office therein are unconstitutional."

The right to vote being a constitutional right there can be no discrimination, and persons cannot be denied this right without some cogent reason that has a reasonable basis in fact, and efforts to require different standards without a reasonable basis for the differentiation are

unconstitutional. The Fifteenth Amendment denied to states the power to take the franchise from persons because of race, color or previous condition of servitude. Later this was amended to include sex. In a constant evolutionary process the federal courts have enlarged this until today any effort to provide different standards for voters without reasonable standards of classification have been repeatedly struck down by the courts as the decisions herein exhibit.

In the case of *Graham vs. Folsom*, 200 U.S. 248, 253, the Court used this expression, which is quoted again in the *Gomillion* case:

> "It was argued in those cases, as it is argued in this, that such alteration or destruction of the subordinate governmental divisions was a proper exercise of legislative power, to which creditors had to submit. The argument did not prevail. It was answered, as we now answer it, that such power, extensive though it is, is met and overcome by the provisions of the Constitution of the United States which forbids a state from passing any law impairing the obligation of contracts."

Thus, in the *Gomillion* case, the Court went on to say:

> "If all this is so in regard to the constitutional protection of contracts, it should be equally true that . . . such power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a state from passing any law which deprives a citizen of his vote because of his race. The

> opposite conclusion, urged upon us by respondents, would sanction the achievement by a state of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.' . . . When a legislature thus singles out a readily isolated segment of a racal minority for special discriminatory treatment, it violates the Fifteenth Amendment."

Where discrimination is involved, we see no difference whether it deals with the apportionment of congressional districts, the gerrymandering of a city, or the passage of laws that take out of residents of a community the right to regulate their own affairs and vest them in nonresidents who through the exercise of multiple voting rights may outvote the residents of the community so affected.

Under Title 28, *United States Code, Annotated*, §1343, dealing with civil rights and elective franchises, it is provided (1) that district courts have original jurisdiction of any civil suit authorized by law to recover damages for deprivation of any right or privilege of a citizen of the United States; or (4) to recover damages for the protection of civil rights, including the right to vote.

Barron and Holtzoff, Federal Practice and Procedure, Vol. 1, §37, p. 105;

Douglas vs. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324,

"The power of the federal courts to protect civil rights from state invasion has been invoked in a variety of cases and has been expanded by judicial decisions to comprehend the rights of freedom of the press, freedom of speech and religious liberty guaranteed by the First Amendment of the Constitution. Thus it would seem that without reference to diversity of citizenship or amount in controversy the district courts have jurisdiction of actions for deprivation of the right freely to assemble for lawful purposes, the right of freedom of the press, and freedom of religious worship.

"The expansion by judicial decisions of the concept of civil rights which may be protected by the federal courts from state action or action under state authority, has rendered somewhat uncertain the precise limits of federal jurisdiction. Jurisdiction has been entertained of actions to protect the right of suffrage against racial discrimination, the right of collective bargaining, the right of freedom from unlawful search and seizure, and the right to hold state office against arbitrary and unlawful invasion by a state governor.

"Recent cases reaffirm the jurisdiction of federal courts in cases involving claims for relief arising from segregation in educational institutions, alleged to result in inequality of treatment and deprivation of civil liberties, and similar claims in other areas of state action."

Barron and Holtzoff, Federal Practice and Procedure, Vol. 1, §37, pp. 198-199.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42, §1983, United States Code, Annotated.

The United States Supreme Court from time to time has ruled that The Constitution of the United States is an elastic instrument which owes its vitality to the fact that it can be changed, modified, stretched, contracted, and put into any shape necessary to meet the changing economic, political, or social eras. The fact that the Congress and the courts have for years adopted a rigid view with reference to voting rights does not mean that the one was right and the other is wrong. It simply means that our philosophies and our ways of life are changing, and The Constitution of the United States and the decisions of the federal courts are changing with the times. As Mr. Justice Roberts stated in *United States vs. Saylor, supra:*

> "This Court now writes into the law what Congress struck out 50 years ago. The Court now restores federal control in a domain where Congress decided the States should have exclusive jurisdiction."

Many years ago, The Supreme Court of the United States, in *McCready vs. Virginia*, 94 U.S. 391, 24 L.Ed. 248, upheld state action discriminating against commercial fishing or hunting by citizens of other states, and sanc-

tioned a Virginia statute applied so as to prohibit citizens of other states but not Virginia citizens, from planting oysters in the tidal waters of the Ware River. A half century later, in the case of *Toomer vs. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, in which counsel was attorney for local fishermen, the Supreme Court set this decision aside on the ground that to uphold it now, in view of the changed conditions of commercial fisheries, would be to "impose an artificial rigidity on the economic pattern of the industry."

The United States Supreme Court for many years held that primaries were not subject to control, either, but this also has been extended. The day of the "horse and buggy" has been relegated to the past. Changing times show their impress in science, medicine, transportation, architecture, music and the arts, and even in the law. As time marches on, so do the courts. So many changes have taken place that what was once regarded as revolutionary is accepted today as commonplace. The right of suffrage to women, direct election of senators, workmen's compensation statutes, the right of collective bargaining, and foreign aid, now are accepted without question. Old-time outdated laws like the Savannah Beach law should have passed out with the turn of the century. One should ever be thankful that we have a judiciary to which the underprivileged, the ignorant, and the oppressed can turn for relief. The expression in the Declaration of Independence that "all men are created equal", has been enlarged, and today there exists, and God willing forever will, true justice, and the motto on the portico of the Supreme Court Building, "Equality Before The Law."

Equal Protection of the Law.

Regardless of whether municipalities are creations of the state, it has been established that neither municipalities nor the State itself can operate to deny to any person equal protection of the laws.

> "Positive rights and privileges are secured by the Fourteenth Amendment, by way of prohibition against state laws and state proceedings affecting such rights and privileges. Under this Amendment classification for purposes of legislation must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
>
> *Royster Guano Co. vs. Virginia, 253 U.S. 412, 415.*

> "'Equal protection of the laws' is not an abstract right, but is a command which the state must respect."
>
> *Hill vs. Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559.*

And as the Supreme Court so aptly stated in *Toomer vs. Witsell, supra*, in dealing with the privileges and immunities clauses with refrence to the rights of citizens of the various states:

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the

discrimination beyond the mere fact that they are citizens of other States."

The same application is made that discrimination against citizens of one's own state likewise is unconstitutional. It is clear that there is no rational reason for the discrimination in the statutes here in question and such discrimination definitely is a denial to complainants of the equal protection of the laws. For the reasons stated, complainants contend they are entitled to the relief which the seek.

Whether the right to vote originates with the Union or with the States is immaterial in this case for, as the Court said in *Baker vs. Carr, supra*, often cited throughout this Brief:

> "The power of Congress to prescribe the qualifications for voters and thus override state law is not in issue here. It is, however, clear that by reason of the commands of the Constitution there are several qualifications that a State may not require.
>
> "Race, color, or previous condition of servitude are impermissible standards by reason of the Fifteenth Amendment . . .
>
> "Sex is another impermissible standard by reason of the Nineteenth Amendment.
>
> "There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

"The traditional test under the Equal Protection Clause has been whether a State has made "an individious discrimination," . . .

"There is no doubt that the federal courts have jurisdiction of controversies concerning voting rights. The Civil Rights Act gives them authority to redress the deprivation . . . 28 U.S.C. §1343 . . . And . . . gives the federal courts authority to award damages or issue an injunction to redress the violation of 'any Act of Congress providing for the protection of civil rights, including the *right to vote.*'

"'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under "color of" state law.' And see *Monroe vs. Pape*, 365 U.S. 167.

"The right to vote in both federal and state elections was protected by the judiciary long before that right received the explicit protection it is now accorded by §1343(4) . . . Fraudulent acts that dilute the votes of some have long been held to be within judicial cognizance. The 'right to have one's vote counted,' whatever his race or nationality or creed, was held in *United States vs. Mosley*, 238 U.S. 383, 386, 35 S.Ct. 904, 905, 59 L.Ed. 1355, to be 'as open to protection by Congress as the right to put a ballot in a box.'

"'The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired.'

"With the conceptions of *Colegrove vs. Green*, 328 U.S. 549; *MacDougall vs. Green*, 335 U.S. 281,

South vs. Peters, 939 U.S. 276, and the decisions they spawned, the Court has never thought that protection of voting rights was beyond judicial cognizance. Today's treatment of those cases removes the only impediment to judicial cognizance of the claims stated in the present complaint."

FILED
OCT 29 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1962

No. 474

JOHNNY G. SPAHOS, EMORY C. BOBO, T. R. COLE, ALEXANDER P. SOLOMON, III, LABON F. HODGES, H. H. O'BRIEN, HENRY H. GLISSON, ROBERT T. BEELAND, B. TAYLOR SMITH, REGAL B. CONCEPCION, T. S. CHU, E. H. SMART, JOE HAWKINS, C. H. COBB, WILLIAM D. SMITH AND MILLEDGE C. JONES,

Appellants,

versus

THE MAYOR AND COUNCILMEN OF THE TOWN OF SAVANNAH BEACH, TYBEE ISLAND, GEORGIA, A MUNICIPAL CORPORATION, HENRY M. BUCKLEY, CLERK OF COUNCIL, J. A. BROWN, MAYOR, WILLIAM S. LOVELL, ALEX MEDDIN, JOHN A. PETERS, BENNO P. HOSTI, JAMES H. POWERS AND ROBERT L. WATERS, COUNCILMEN, AND WILLIAM C. FLEETWOOD, COUNCILMAN-ELECT, AND CHARLES M. DEBELE, E. A. LEONARD AND DR. WILLIAM WEICHSELBAUM, JR., BOARD OF REGISTRARS OF CHATHAM COUNTY, GEORGIA,

Appellees.

MOTION TO DISMISS OR AFFIRM

ANTON F. SOLMS, JR.,
Suite 820 Realty Building
Savannah, Georgia

IN THE

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Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Savannah Division

MOTION TO DISMISS OR AFFIRM.

Appellees move the Court to dismiss the appeal herein on the ground hereinafter set forth, or to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

JURISDICTION

While the Supreme Court of the United States has jurisdiction to review the decision rendered by the specially convened three-judge District Court (*Title* 28, U.S.C.A., § 1253). Appellees respectfully submit that in the exercise of sound judicial discretion the United States Supreme Court should deny review since the decision of the three-judge court does not involve a federal substantive question not heretofore decided by this Court nor was such decision discordant with applicable decisions of this Court.

QUESTIONS FOR DECISION UPON MOTION TO DISMISS OR AFFIRM

1.

Whether or not this Court should accept jurisdiction in this case when the same question was previously ruled on by this Court and a finding made of want of a substantial federal question. (See *Bobo v. Mayor and Councilmen of the Town of Savannah Beach*, 364 U. S. 339, 81 S. Ct. 181, 5 L. Ed. 2d 185 (1960).

2.

Whether or not the so-called "stranglehold" situation deemed present in *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 633 (1962) is present in this case where there is no State constitutional prohibition against granting suffrage to non-resident voters who own property in a municipality.

3.

Whether or not the State has the power to classify voters into the classifications of residents on one hand and non-resident property owners on the other.

REASONS FOR DISMISSING APPEAL OR AFFIRMING JUDGMENT OF LOWER COURT

POINT ONE

THIS APPEAL SHOULD BE DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

In 1938, the Supreme Court of Georgia, in the cases of *Harris v. McMillan*, 186 Ga. 529, 198 S. E. 250, and *Sharpley v. Fitzgerald*, 186 Ga. 536, 198 S. E. 255, upheld a municipal charter provision restricting the franchise to property owners and permitting non-resident property owners to vote in municipal elections.

In 1960, in the case of *Bobo v. Mayor and Councilmen of the Town of Savannah Beach, Tybee Island, Georgia*, 216 Ga. 12, 114 S. E. 2d 374, the Supreme Court of Georgia affirmed the dismissal by the lower court in a unanimous opinion reiterating the following portion of the holding in *Harris v. McMillan, supra:*

> "There is no requirement in our Constitution that there be uniformity in the charters of our municipalities . . . In so far as the powers and restrictions contained therein run counter to no constitutional provision, and no general law, they are valid.
>
> "The legislature had the power, in granting this charter, to permit persons residing without the municipality but owning real estate therein, but residing in the County of Chatham, to vote and hold office in such municipality, if otherwise qualified under the Constitution."

The Georgia Supreme Court further stated in the *Bobo* case:

> "There is also no merit in the contention that the provision in Tybee's charter which permits such non-resident

person to thus participate in the management of its municipal affairs offends the equal-protection clauses of the Federal Constitution (Code § 1-1813) and the Constitution of this State (Code § 2-193), on the ground that it dilutes the voting power of those who actually reside within the municipality and is therefore discriminatory class legislation. 'It is only in cases where laws are applied differently to different persons under the same or similar circumstances that the equal protection of the law is denied.' *Baugh v. City of LaGrange*, 161 Ga. 30 (2a) (130 S. E. 69); *City of Valdosta v. Harris*, 156 Ga. 490 (4) (119 S. E. 625)."

The plaintiff appealed to the Supreme Court of the United States which held: "The appeal is dismissed for want of a substantial federal question."

POINT TWO

There is no constitutional prohibition under the Constitution of Georgia against non-resident voters in a municipal election. There is no requirement in that Constitution that there be uniformity in the charters of Georgia municipalities. *See Harris v. McMillan* and *Bobo v. Mayor and Councilmen of the Town of Savannah Beach, supra.*

In *Baker v. Carr, supra*, plaintiffs were foreclosed from obtaining from the legislature what the Tennessee Constitution guaranteed to them.

The plaintiffs in the case at bar assert discrimination and claim that they are denied equal protection under the Fourteenth Amendment to the Federal Constitution. Discrimination must be invidious to become actionable. If there is any discrimination on the theory of allowing non-residents to vote in the municipality along with residents when such is not permitted by the charters of other municipalities in the county or state, there is no element of invidiousness if there is a reasonable

chance that political relief can be obtained. The legislative history in the case at bar reveals that throughout the years the charter of the Town of Savannah Beach has in fact changed and the relief sought by the plaintiffs was actually enacted into law by an Act of 1947 which was later ruled unconstitutional on other grounds (Petition, pp. 16-18).

POINT THREE

The challenged classification of voters is reasonable and equitable. In the general election on April 2, 1962, for the election of Mayor and Councilmen of Savannah Beach, Tybee Island, Georgia, a total of 992 persons were registered through December 26, 1961. Of said list of qualified voters, 549 were permanent residents of Savannah Beach and 443 were qualified by reason of (1) ownership of property within said municipality and (2) residence in Chatham County, Georgia.

A substantial majority of the non-resident property owners reside at Savannah Beach for a period of one to four months during the summer season and at other times during the year.

According to the tax digest of Savannah Beach as of May 1, 1962, the assessed value of property returned by non-resident property owners amounts to $2,852,040.00 and the assessed value of property returned by permanent residents of said municipality totals $1,586,185.00.

The property owners at Savannah Beach have a very real and vital interest in the conduct of the affairs of this resort municipality. The legislature of Georgia has recognized the existence of this interest by according them the right to vote and to representation on the Town Council. Until the General Assembly legislates otherwise, that right must be recognized by the Courts.

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits

the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practise, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. State of Maryland*, 366 U. S. 420, 425 f., 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1960).

Appellees herein respectfully submit that for the reasons asserted herein, This Honorable Court should dismiss the appeal herein or affirm the judgment sought to be reviewed.

Respectfully submitted,

ANTON F. SOLMS, JR.
Suite 820 Realty Building
Savannah, Georgia.
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for the appellees in the within and foregoing matter, and,

I further certify that I have this day served a copy of the foregoing Motion to Dismiss the Appeal or Affirm the Judgment Sought to be Reviewed on the Appeal, on the Attorneys for the appellants, namely, Aaron Kravitch and Phyllis Kravitch, by mailing a copy of the same, properly addressed and with adequate postage attached, to their respective offices in Savannah, Georgia.

This 20th day of October 1962.

Attorney for Appellees